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No. 86-870

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1986

PHILLIPS PETROLEUM COMPANY and
CINQUE BAMBINI PARTNERSHIP
Petitioners

v.

STATE OF MISSISSIPPI and
SAGA PETROLEUM U.S. INC.,
Respondents.

BRIEF FOR RESPONDENT SAGA PETROLEUM U.S. INC.

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QUESTION PRESENTED

How was the scope of Mississippi's public trust lands determined when Mississippi became a state?

RULE 28.1 LISTING

The Rule 28.1 list of parents and affiliates of the Petitioner Saga Petroleum U.S. Inc. is set forth on page ii of its Brief in Opposition to Petition for a writ of Certiorari to the Supreme Court of Mississippi. There have been no changes in that list since the filing of the brief.

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STATEMENT OF THE CASE

The controversy before this court involves a title dispute as to approximately 600 acres of wetlands in Hancock County, Mississippi. The property is bounded on the east by the Jourdan River, a major watercourse, and on the south by the Bayou LaCroix, which flows into the Jourdan River. The Jourdan River, in turn, dispenses into the Bay of St. Louis, an inlet of the Gulf of Mexico. The property is covered by water that is subject to the ebb and flow of the tide.

In 1977, the Mississippi State Mineral Lease Commission granted oil and gas leases to Respondent Saga Petroleum U.S. Inc., covering the aforementioned 600 acres of land. As a result, the Petitioner Cinque Bambini Partnership and other title holders of record filed suit against the Respondents State of Mississippi and Saga Petroleum U.S. Inc., alleging that the property subject to the leases was actually part of 2,400 acres of land owned by the title holders. In the Chancery Court of Hancock County, Mississippi, the Respondents defended their actions on the ground that title to disputed property was held by the State pursuant to the public trust doctrine.

The Supreme Court of Mississippi affirmed in part, and reversed in part the Chancery Court's decision. *Cinque Bambini Partnership v. Mississippi*, 491 So. 2d 508 (Miss. 1986). Specifically, the supreme court concurred with the chancery court determination that the State was entitled to lands subject to the ebb and flow of the tide. The supreme court held that certain parts of the property, on which man-made lakes had been created, did not constitute public trust lands. *Id.* at 520. The supreme court remanded the case to the chancery court for a precise factual determination of the location of the mean high tide line that identified the boundary between uplands and wetlands, and thus between private and state-owned property. *Id.* at 521-22.

The Petitioners' Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi has been granted by this Court.

SUMMARY OF ARGUMENT

The Supreme Court of Mississippi properly determined that the State of Mississippi acquired title to lands beneath nonnavigable as well as navigable tidal waters pursuant to the public trust doctrine. This conclusion is supported by decisions of the Supreme Court of the United States, as well as by English and American cases rendered before and at the time of Mississippi's entry into the union. These cases hold that the sovereign's (or a state's) interest extends to the lands beneath water subject to the ebb and flow of the tide.

The Petitioners challenge the ruling of the Supreme Court of Mississippi, arguing that the Court applied the wrong test in ascertaining the scope of Mississippi's public trust lands. Specifically, the Petitioners contend that the State's public trust lands are limited to those lying beneath waters that are navigable in fact rather than those that are subject to tidal influence. This claim has no merit since it conflicts with the applicable common law rule for defining the sovereign's interest in lands beneath waters when the first thirteen states were born and when Mississippi joined the Union. These points in time serve as the benchmarks for ascertaining the test that determined the scope of Mississippi's public trust lands and for the application of that test for the purpose of identifying permanently the trust lands. Case law cited by the Petitioners from later time periods cannot undermine the foundation of Mississippi's trust lands. Nor does the Petitioners' authority from the preceding era provide substantial support for their argument. Indeed, the Petitioners have been compelled to rely on authority pertaining to the public's right of passage over navigable waters as the primary support for their argument.

While the public's right of passage over water is undeniably linked closely with the issue of navigability, the primary issue in the present case involves the determination of title to the soil.

The Supreme Court of Mississippi has properly considered the sources of Mississippi's public trust lands and thereby concluded that the soil beneath the State's tidal waters falls within the public trust. Thus, the court's decision should be affirmed.

ARGUMENT

I. THE SUPREME COURT OF MISSISSIPPI PROPERLY RULED THAT THE SCOPE OF MISSISSIPPI'S PUBLIC TRUST LANDS WAS DETERMINED BY THE "EBB AND FLOW" OF THE TIDE.

The State of Mississippi claims title to the land in controversy by virtue of the public trust doctrine. The Supreme Court of the United States described this doctrine in the following passage from the case of *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 435 (1892):

> It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states.

The Petitioners suggest that the first federal embodiment of the doctrine appeared in 1841 with the Supreme Court's decision in the case of *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842) (*see* Brief for Petitioners at 29). A proper analysis of the doctrine cannot commence with an examination of the federal law of 1841, however. Mississippi be-

came a state in 1817. Well settled is the rule that the scope of a state's public trust lands must be determined at the time that the state joins the Union. *See, e.g., Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 376 (1977); *United States v. Utah*, 283 U.S. 64, 75 (1931); *Goodtitle v. Kibbe*, 50 U.S. (9 How.) 471, 477 (1850). The nature of the doctrine in 1817 and before, and the principles from which it descended, are far more important to the determination of this case than developments beginning in 1841.

The public trust doctrine was derived from a combination of English common law principles. Of primary interest in the present case is the principle governing the ownership of lands beneath waters. English courts have long recognized that the sovereign holds title to the land beneath tidal waters within the sovereign's domain. *See, e.g., Bulstrode v. Hall*, 82 Eng. Rep. 1024 (1663); *see also* 3 J. Kent, *Commentaries on American Law* 427 (14th ed. 1896); *see also Commonwealth v. Alger*, 61 Mass. 53, 65 (1853) (holding that "[b]y the common law of England, as it stood long before the emigration of our ancestors to this country and the settlement of the colony of Massachusetts, the title to the land or property in the soil, under the sea, and over which the tide waters ebbed and flowed, including flats, or the seashore, lying between high and low water mark, was in the King, as the representative of the sovereign power of the country"); *Day v. Day*, 22 Md. 530, 536 (1865) (holding that the owners of lands adjacent to tidal waters had no claim to the lands beneath such waters, which belonged to the public).

Controversy exists as to the breadth of this right at common law; some commentators suggest that English courts did not routinely recognize that the sovereign's interest extended beyond the low-tide to the high-tide line until after the American Revolution. *See Bell v. Town of* Wells, 510

A.2d 509, 511 (Me. 1986). Nevertheless, when early American courts addressed the issue of the ownership of lands beneath waters, they invariably concluded that the common law embraced the "ebb and flow" test and included all tidal land up to the high-tide line within the sovereign's interest. *See Shively v. Bowlby*, 152 U.S. 1, 11-13 (1894). These same rights were deemed to pass to the 13 original states when each became a state. In the case of *State ex rel. Rice v. Stewart*, 184 Miss. 202, 184 So. 44, 49 (1938), the Supreme Court of Mississippi analyzed the leading authority pertaining to the acquisition of sovereign rights in public trust lands by the 13 original states:

> [A]s to the rights held by the original states, it was said in Mumford v. Wardwell, 6 Wall. 423, 432, 18 L. Ed. 756, that: "When the Revolution took place, the people of each State became themselves sovereign, and in that character hold the absolute right to all their navigable waters and the soils under them, subject only to the rights since surrendered by the Constitution" [page 436]. Again in Appleby v. New York, 271 U.S. 364, 46 S.Ct. 569, 70 L.Ed. 992, it is said that [page 573]: "Upon the American Revolution, all the proprietary rights of the crown and Parliament in and all their dominion over lands under tide-water vested in the several states," etc. See, also, the rule announced in 27 R.C.L. 1356-1359, and in the cases of Martin v. Waddell, 16 Pet. 367, 10 L.Ed. 997; Weber v. State Harbor Commissioners, 18 Wall. 57, 21 L.Ed. 798; Goodtitle v. Kibbe, 9 How. 471, 13 L.Ed. 220; McCready v. Virginia, 94 U.S. 391, 24 L.Ed. 248; and Knight v. United States

> Land Association, 142 U.S. 161, 12 S.Ct. 258, 35 L.Ed. 974. In the Knight Case, Mr. Justice Lamar, in delivering the opinion of the court, said [page 264]: "It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tidewaters in the original states were reserved to the several states, and that the new states since admitted have the same rights, sovereignty, and jurisdiction in that behalf, as the original states possess within their respective borders". And, in the more recent case of Borax Consolidated, Ltd. et al. v. City of Los Angeles, 296 U.S. 10, 56 S.Ct. 23, 80 L.Ed. 9, all of the foregoing authorities are cited with approval, and it was therein expressly held that the Federal government has never had the power to convey land beneath tide waters within the borders of a state, after the admission of such state into the union.

The courts of Mississippi have long recognized that the state of Mississippi, like the original 13 states, was entitled to lands beneath waters subject to the ebb and flow of the tide. *See, e.g., State ex rel. Rice v. Stewart, supra*; *Rouse v. Sancier's Heirs*, 166 Miss. 704, 146 So. 291 (1933); *Money v. Wood*, 152 Miss. 17, 118 So. 357 (1928); *Martin v. O'Brien*, 34 Miss. 21 (1857). Other states also embraced the common law rule. *See, e.g., Adams v. Pease*, 2 Conn. 481 (1818); *Middletown v. Pritchard*, 4 Ill. (3 Scam.) 509 (1842); *Commonwealth v. Chapin*, 22 Mass. (5 Pick.) 203 (1827); *Berry v. Carle*, 3 Me. 269 (1825); *Scott v. Willson*, 3 N.H. 321 (1825); *Commissioners of the Canal Fund v. Kempshall*, 26 Wend. 404 (N.Y. 1841); *Gavitt v. Chambers*, 3 Ohio 495 (1828); *Hays v. Bowman*, 22 Va. (1 Rand.) 417 (1823).

Admittedly, in the first decades of the nineteenth century, the opinions of some American courts did contain some general language indicating that the sovereign's (or public's) rights attached to lands beneath "navigable waters." *See, e.g., Chapman v. Kimball*, 9 Conn. 38, 40 (1831). However, American courts of the era used such language in accordance with the English common law principle whereby the phrase "navigable waters" is a term of art referring to waters that are subject to the ebb and flow of the tide. *See Simons v. French*, 25 Conn. 346 (1856) (recognizing that under English common law, navigable waters are those in which the tide ebbs and flows, and that the King is the owner in fee of such lands); *Hollister v. Union Co.*, 9 Conn. 435, 437 (1833) (noting that the Connecticut River was a "public navigable river" since it was subject to the ebbing and flowing of the tide"); *Day v. Day*, *supra*, 22 Md. at 530 (holding that rivers and streams within the ebb and flow of the tide are deemed to be navigable waters); *Flanagan v. City of Philadelphia*, 42 Pa. 219, 229 (1862) (identifying the common law rule that tidal waters are considered to be navigable waters); *see also Elwood v. City of New York*, 450 F. Supp. 846, 861 (S.D.N.Y. 1978) (discussing the relationship between "tidal" and "navigable" waters at common law). Thus, the mere use of the term "navigable waters" in such instances neither implies the use of a "navigability in fact" test nor reflects any substantive departure from the traditional "ebb and flow" test.

Some American colonies did deviate from the "ebb and flow" test in other ways, however. For example, in 1641 Massachusetts passed an ordinance modifying the common law rule by granting private land owners title to lands 100 rods below the high-tide mark in order to encourage the construction of piers and similar structures by private parties. *See Storer v. Freeman*, 6 Mass. 438 (1810). Pennsylvania, by contrast, recognized that the public had broader rights in lands beneath waters than provided for at common

law. There, the public trust lands were deemed to include the lands beneath both tidal water *and* waters that were navigable in fact. As noted in the case of *Flanagan v. City of Philadelphia*, *supra*, 42 Pa. at 230, "in Pennsylvania we have followed the civil law definition of navigable rivers, rather than those of the common law, and we hold as navigable not only those streams which are subject to tides, but all rivers capable of being navigated; that is navigable in the common sense of the term. . . . In this we have departed not only from the common law of England, but from the law of most, though not all our sister states."

As indicated in section III of this brief, the exceptional approach taken by Pennsylvania through the mid-nineteenth century is noticeably similar to that taken by the Supreme Court of the United States thereafter. Yet American courts of the eighteenth and early nineteenth centuries generally disdained any "navigability in fact" test as a means of determining the ownership of lands beneath waters. Indeed, until well after Mississippi joined the Union, even jurisdictions that did deviate from strict adherence to the "ebb and flow" test did so in full recognition that the "ebb and flow" test governed as the common law rule.

In the present case, the Supreme Court of Mississippi rendered its decision regarding the scope of Mississippi's public trust lands after considering the controlling state authority of the period when Mississippi joined the Union. As discussed above, in Mississippi and elsewhere that authority embraced the test based upon the ebb and flow of the tide. Thus, the Supreme Court of Mississippi quite properly ruled that the tidal property in question in the present case falls within the State's public trust lands.

The same conclusion is reached when one compares the public trust lands of Mississippi with those of the 13 original states. As discussed in section III of this brief, pursuant to

the "equal footing" doctrine, Mississippi is entitled to the *same* rights regarding public trust lands as held by the original 13 states. At the time of their birth between 1787 and 1790, those states immediately acquired the sovereign rights previously held by the King of England over the lands within their boundaries. Such rights extended to the soil beneath tidal waters. Today, Mississippi's public trust lands cannot be redefined so as to preclude the State from holding the same rights to tidal lands that the first 13 states held.

II. THE PETITIONERS HAVE IMPROPERLY CHARACTERIZED THE NATURE OF THE PUBLIC TRUST DOCTRINE BY FAILING TO DISTINGUISH BETWEEN THE RIGHT OF PASSAGE OVER NAVIGABLE WATERS AND THE RIGHT TO THE LANDS BENEATH WATERS.

The public trust doctrine embraces a number of distinct English common law principles involving water rights. Both the sovereign's right to tidal lands and the public's right of passage over navigable waters have been incorporated in the doctrine. In order to understand and apply properly the doctrine, these sources must be analyzed separately, for they were treated as distinct concepts in the English common law. The Petitioners have failed to acknowledge the character of the American doctrine as a composite of English common law rights and principles. English authority addressing one of these rights or principles is not freely applicable to other components of the doctrine. As a consequence of the Petitioners' confusion of the elements comprised by the doctrine, their argument is largely unsupported by authority that is relevant to the issue presented in this case.

English common law has long provided that all members of the public have a right of way over tidal navigable waters, a right that is completely distinct from the sovereign's interest in the lands beneath tidal waters. *See, e.g., Fitzhardinge v. Purcell*, [1908] 2 Ch. 139 (noting that despite the public's lack of rights in soil beneath tidal navigable rivers, the public does have a right of navigation and fishing over such waters); *Rex v. Montague*, 107 Eng. Rep. 1183 (1825) (wherein J. Holroyd characterized navigable waters as a highway). The Petitioners have relied almost exclusively on this body of authority involving rights of passage to support the argument that the sovereign's interest extends only to

those lands that are beneath waters which are navigable in fact. Thus, the cases of *Mayor of Colchester v. Brooke*, 7 Q.B. 339, 115 Eng. Rep. 518 (1845); *Rex v. Montague*, *supra*; *Rose v. Miles*, 105 Eng. Rep. 773 (K.B. 1815); *Mayor of Lynn v. Turner*, 1 Cowp. 86, 98 Eng. Rep. 980 (K.B. 1774); and *Pierse v. Fauconberg*, 97 Eng. Rep. 320 (1757), cited by the Petitioners, all address the issue of the public's right of passage over waters rather than the sovereign's interest in the lands beneath waters.

This body of law simply does not support the Petitioners' argument in the present case. English courts have been reluctant to eschew the "ebb and flow" test for a "navigability in fact" test as a means of determining the sovereign's interest in the soil beneath waters. This point is illustrated by a number of English decisions that indicate that the soil beneath waters navigable in fact, but nontidal, does not belong to the sovereign. *See, e.g., Bristow v. Cormican*, 3 App. Cas. 641 (1878); *Lichester v. Raishleigh*, [1889] 38 W.L.R. 104, 61 L.T.R. 477 (n.s.), 5 T.L.R. 739.

In the cases cited by the Petitioners, however, it is not surprising that the courts have considered the issue of navigability in fact in reaching their decisions. Those cases did involve the right of passage over waters. Where navigation is impossible, no public use for passage can exist. Thus there is a strong logical connection between a "navigability in fact" test and the right it defines.

American courts have also recognized the public's right of passage over navigable waters. As stated in the case of *Gray v. Gray*, 178 Md. 566, 16 A.2d 166, 170 (1940), "[a]t common law, such waters as are navigable in the popular sense of the word, regardless of whether the tide ebbs or flows in them, are public highways." *See also State v. Hooper*, 3 Conn. Cir. Ct. 143, 209 A.2d 539 (1965); *Lenoir*

County v. Crabtree, 158 N.C. 357, 74 S.E. 105 (1912). Nevertheless, in the early part of the nineteenth century, American courts maintained the distinction between the right to the lands beneath the water and the right to passage over the water. Furthermore, courts noted a distinction between the appropriate tests for determining the scope of these rights. This point is illustrated by the following passage from the case of *Cobb v. Davenport*, 32 N.J.L. 369, 378-79 (Sup. Ct. 1867):

> [B]y the common law all waters are divided into public waters and private waters. In the former, the proprietorship is in the sovereign; in the latter, in the individual proprietor. The title of the sovereign being in trust for the benefit of the public--the use, which includes the right of fishing and of navigation, is common. The title of the individual being personal in him, is exclusive--subject only to a servitude to the public for purposes of navigation, if the waters are navigable in fact.
>
> The test by which to determine whether waters are public or private, is the ebb and flow of the tide. Waters in which the tide ebbs and flows--so far only as the sea flows and reflows, are public waters; and those in which there is no ebb and flow of the tide, are private waters.
>
> These principles of the common law are so well settled, that a citation of authorities on the subject is quite unnecessary. They are stated and illustrated in Hale's Treatise, *De Jure Maris*, (*Harg.*

Law Tracts,) a book of so high authority, that from it there seems to be no appeal, either by sovereign or subject, upon any question relating to their respective rights, either in the sea, arms of the sea, or private streams of water. 6 *Cow.* 536, *note to Ex parte Jennings*; *The People v. Platt*, 17 *Johns.* 210, per Spencer, J.; *Hooker v. Cummings*, 20 *Johns.* 90; *Morgan v. Reading*, 3 *Smedes & Marshall* 366; 3 *Kent* 411, 412; 2 *Washb. R. Prop.* 632.

And all the cases in which waters above the ebb and flow of the tide, such as the great inland lakes and the larger rivers of the country, are held to be public in any other sense than as being subjected to a servitude to the public for purposes of navigation, are confessedly a departure from the common law.

The tidal test, as distinguishing waters in which the property is in the sovereign, from those in which it is in private individuals, was said on the argument to be founded in no principle. Many of the rules of the common law, by which rights are ascertained and prop- erty is acquired, held, and transmitted, if subjected to such criticism would be found to be equally devoid of principle. As a rule by which individuals may be guided in ascertaining what rights belong to them, as a portion of the public, and what are exclusively within the domain of private ownership, it has the merit of uniformity and certainty, and is easy of application. The criterion sug-

> gested on the argument, of holding all rivers which are navigable in fact to be public rivers, and those which are not navigable in fact to be private rivers, is wanting in that accuracy and certainty at which the law aims. It can only be made certain by the addition of some arbitrary rule, such as depth of water, quantity of tonnage, or the like, and even then is still open to the objection that no man can tell whether he is exercising a public right, or trespassing upon a private right, without entering upon an investigation, and thus the way is opened for discussion and disturbances.

Similarly, other American courts have recognized that the issue of navigability in fact, while plainly relevant to the public's right of passage over waters, is not relevant to the issue of the ownership of soil beneath waters. For example, in the case of *Flanagan v. City of Philadelphia*, *supra*, 42 Pa. at 229-30, the court set forth the following analysis regarding the public's interest in passage over, and the soil beneath, water:

> At common law, those rivers only are called navigable in which the tide ebbs and flows. . . . [Nevertheless] "there be other rivers, as well fresh as salt, that are of common or public use for the carriage of boats and lighters; and these, whether they are salt or fresh, whether they flow and reflow or not, are *prima facie*, *publici juris*, common highways for man, goods, or both, from one inland town or another." The common law definition of navigable rivers affects, therefore rather the

> proprietorship in the soil or bed of the river than the right of navigation.

(Quoting Hargrave's Tracts, *De Jure Maris*, ch. 3.)

In short, the use of a "navigability in fact" test to determine the scope of the sovereign's or public's rights in soils beneath waters is logically inappropriate since the uses of such lands are not limited to navigation or passage over the water. Despite the Petitioners' assertions to the contrary, the sovereign's common law interest in the lands beneath tidal waters did not serve the sole objective of facilitating or controlling navigation. For example, in the seventeenth century, the primary objective of the sovereign in laying claim to the lands beneath the high and low tide lines was to generate revenue for the Crown from the sale of fishery and other rights in the foreshore. *See* Taylor, "The Seashore and the People," 10 *Cornell L.Q.* 303, 306 (1925). American courts have also recognized that public trust lands serve a variety of functions unrelated to navigation, including fishing, swimming, fowling, and other purposes. *See, e.g., State v. George C. Stafford & Sons, Inc.*, 99 N.H. 92, 105 A.2d 569 (1954); *Matthews v. Bay Head Improvement Association*, 95 N.J. 306, 471 A.2d 355, *cert. denied*, 469 U.S. 821 (1984); *Arnold v. Mundy*, 6 N.J.L. 1, 12 (Sup. Ct. 1821).

In the present case, representatives of the State of Mississippi have leased portions of the state's tidal lands for the purpose of obtaining revenue and thereby benefiting the state's citizens. The Supreme Court of Mississippi has followed a well-beaten path of authority in protecting the state's right to use its public trust lands for a purpose unrelated to navigation.

The disputed lands in the present case fall within the public trust even if navigation is held to be a factor in determining the scope of public trust lands. The Petitioners'

authority pertaining to a "navigability in fact" test is not dispositive of the present controversy, since that authority primarily involves issues of admiralty rather than title to soil. Where navigation is related to the use of the lands beneath waters, courts have embraced the "ebb and flow" test. A number of federal courts have determined that waters not navigable in fact are nevertheless deemed to be "navigable waters" for the purpose of determining the scope of the federal navigational servitude. *See*, e.g., *United* States *v. Stoeco Homes, Inc.*, 498 F.2d 597 (3d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975) (holding that the scope of the federal servitude is defined by the ebb and flow of the tide and therefore extends to include tidal marshes); *United States v. Weisman*, 489 F. Supp. 1331, 1340 (M.D. Fla. 1980) (in considering whether tidal creeks are navigable, the court held that "the legal status of a determination of navigability applies laterally over the entire surface of the water body and extends shoreward to the mean high water mark"; where a tidal creek lies adjacent to a navigable river, "no inquiry is required here concerning the potential of these tidal creeks for commerce or transportation"). *See also United States v. Cannon*, 363 F. Supp. 1045 (D. Del. 1973); *United States v. Lewis*, 355 F. Supp. 1132 (S.D. Ga. 1973).

In light of the federal authority equating the navigability of waters with their tidal influence, the Petitioners' argument should be rejected by this Court.

III. THE SUPREME COURT OF MISSISSIPPI'S APPLICATION OF THE EBB AND FLOW TEST IS FULLY CONSISTENT WITH THE DECISIONS OF THIS COURT WHICH ACKNOWLEDGE THE CONTINUING VITALITY OF THE TEST.

In the years that have followed the birth of the first 13 states, the public trust doctrine has undergone a process of evolution. Contrary to the contention of the Petitioners, this evolutionary process has been one of expansion rather than retraction. There is no basis for assuming that the Supreme Court of the United States has ever had the authority or the intention to deprive the newer states of the public trust rights held by the original 13 states.

When new states were admitted to the Union, they were deemed to have the same rights "in all respects whatever" held by the original states regarding public trust lands. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 224 (1845); see *United States v. Texas*, 339 U.S. 707, 716 (1950). New states entered the Union on "equal footing" with the original 13 states. When Mississippi entered the Union in 1817, it acquired the same rights under the "equal footing" doctrine that were held by the original 13 states. As previously discussed, each of those states acquired rights to the land within its boundaries under waters subject to the ebb and flow of the tide; such was the rule at common law when the original states were born from 1787 through 1790. The scope of Mississippi's public trust lands, established and fixed for all time in 1817, therefore included the soil beneath the state's tidal waters. If this Court were to conclude that the scope of Mississippi's public trust land was determined by the common law rule controlling at the time of Mississippi's entry into the Union, the same result obtains since the "ebb and flow" test was the accepted rule in

Mississippi at that time. No federal authority for a navigability test appeared until considerably later in the century.

Well after Mississippi joined the Union, the Supreme Court of the United States adopted a modified test for determining the scope of public trust lands. In a series of cases beginning with *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842), and reaching to the present day, the Supreme Court has considered the factor of navigability in determining the scope of public trust lands in certain situations. The Petitioners argue that this use of a navigability criterion represents a retraction of the public trust doctrine by the Supreme Court. Such is not the case, however. The primary objection to the claim that the Supreme Court retroactively narrowed the scope of the states' public trust lands by adopting a restrictive test for the determination of such lands arises from the fact that the Supreme Court is without authority to do so. As noted in the case of *Summa Corp. v. California ex rel. State Lands Commission*, 466 U.S. 198, 205 (1984), "[t]he federal government, of course, cannot dispose of a right possessed by the State under the equal footing doctrine of the United States Constitution." Rather, the scope of a state's public trust land is determined and fixed at the time that the state joins the Union.

Instead of narrowing the public trust lands of states that had previously acquired them in accordance with the ebb and flow test, the Supreme Court appears to have *expanded* the public trust and equal footing doctrines for the benefit of inland states that could derive few benefits from sovereign rights to tidal waters. The early members of the Union were generally coastal states or states with large tidal rivers. For these states, the application of the common law ebb and flow test was appropriate. For inland states that subsequently joined the Union, sovereign rights in lands beneath tidal waters amounted to a hollow interest. The

Supreme Court appears to have developed a navigability criterion to provide these late entries into the Union with rights of similar practical substance as those held by the early members of the Union. This conclusion finds support from the fact that the cases in which the Supreme Court applied the navigability criterion to determine the scope of public trust lands generally have involved inland waters. *See, e.g, Montana v. United States*, 450 U.S. 544 (1981); *Oklahoma v. Texas*, 258 U.S. 574 (1922); *Scott v. Lattig*, 227 U.S. 229 (1913); *Shively v. Bowlby*, 152 U.S. 1 (1894); *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892).

Indeed, in at least two relatively modern cases, the Supreme Court has reaffirmed its adherence to the ebb and flow test in situations involving coastal waters. In the case of *Borax Consolidated v. City of Los Angeles*, 296 U.S. 10, *rehearing denied*, 296 U.S. 664 (1933), the Supreme Court considered whether certain tidelands lying off the coast of California fell within that state's public trust lands. In the opinion of the Court, Chief Justice Hughes stated that "[t]he soils under tidewaters within the original states were reserved to them respectively, and the states since admitted to the Union have the same sovereignty and jurisdiction in relation to such land within their borders as the original states possessed." 296 U.S. at 15. In light of this rule, the Court determined that the ownership of the tidelands in question could be resolved with the use of a simple test: "Was it upland, which the United States could patent, or tideland, which it could not?" *Id.* at 18-19. The Court did not consider the factor of navigability at all in ascertaining the scope of the public trust lands, but instead looked exclusively to the ebb and flow test.

In the subsequent case of *United States v. California*, 332 U.S. 19, *rehearing denied*, 332 U.S. 787 (1947), this Court directly acknowledged that the public trust doctrine had been expanded rather than contracted by stating that both

the soils lying beneath inland navigable waters *and* tidelands were within the trust. 332 U.S. at 36.

In light of the foregoing authority, the Supreme Court of Mississippi has clearly rendered a decision consistent with those of the Supreme Court of the United States. Therefore, the judgment of the Supreme Court of Mississippi should be affirmed by this Court.

IV. EQUITABLE PRINCIPLES DO NOT PREVENT THE OPERATION OF THE PUBLIC TRUST DOCTRINE IN THE PRESENT CASE.

The Petitioners' argument that the state should not be permitted to exercise its public trust rights for equitable reasons is not supported by sound principles of equity. The mere fact that record title holders of the property claim ignorance of the state's public trust interest in the disputed land provides no basis for equitable relief. Regardless of the approach of other jurisdictions regarding the scope of public trust lands over the years, Mississippi courts have consistently applied the "ebb and flow" test to identify the state's public trust lands. *See, e.g., State ex rel. Rice v. Stewart*, *supra*; *Rouse v. Sancier's Heirs*, *supra*; *Money v. Wood*, *supra*; *Martin v. O'Brien*, *supra*. Private parties who have obtained title to property beneath tidal waters simply have no right to rely on such titles in light of the state's well-recognized acceptance of the common law rule. Further, the important objective of maintaining stability within the state's real property title system will plainly be furthered by the affirmation of the state's long-standing adherence to the "ebb and flow" test.

The Petitioners' suggestion that the importance of the private interests at stake in this case is superior to the public interest involved is not persuasive. As to the broader implications of the resolution of this controversy, the importance of the public's interest in tidelands cannot be overstated. From a standpoint of sheer numbers, the scales obviously tip in favor of upholding the rights of the public. All of the citizens of Mississippi (and other states as well) share an interest in the public trust lands. There is no reason to believe that the importance of the public's interest in public trust lands somehow pales by comparison with the interest of private title holders. Indeed, the status of tidelands as

areas of primary public concern has been firmly established in recent years as the various benefits and vulnerabilities of tidelands have become known. This heightened concern is reflected in legislation such as Mississippi's Coastal Wetlands Protection Law, *Miss. Code Ann.* §§ 49-27-1 et seq. (Supp. 1986) and similar acts in other coastal states, which are designed to preserve coastal wetlands.

In light of the significance of the public interest in tidelands, and the failure of the aggrieved private owners to consider properly Mississippi's long-standing application of the "ebb and flow" test to determine the limits of public trust lands, no equitable basis exists to justify the abandonment of that test for the benefit of a limited number of adversely affected private landowners.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Mississippi should be affirmed.

Respectfully submitted,

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